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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

REEDING FORD, a corporation,
Petitioner,

vs.

CALIFORNIA STATE BOARD OF EQUALIZATION,
an agency of the State of California,
GEORGE R. REILLY, ERNEST J. DRONENBURG, JR.,
WILLIAM M. BENNETT, RICHARD NEVINS and KENNETH CORY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did 28 U.S.C. § 1341 bar the district court from subject matter jurisdiction of petitioner's action, challenging the Constitutionality of a deficiency assessment for sales or use taxes on leases of motor vehicles to United States Department of Agriculture, when (i) petitioner did not have sufficient assets to invoke the California statutory refund procedure for contesting the validity of such taxes and (ii) California law does not provide petitioner an alternative remedy either by declaratory or injunctive relief or by extraordinary writ? More specifically, is petitioner deemed to have a "plain, speedy and efficient" remedy within the meaning of § 1341 even though petitioner may not invoke the only remedy provided by California law because it does not have sufficient assets to prepay the tax deficiency of \$239,466 (as of March 28, 1982) and sue for refund?
2. Did 28 U.S.C. § 1341 bar the district court from jurisdiction of petitioner's action to enforce the injunctive provisions of the decree entered in *United States v. California State Board of Equalization*, No. 79-03359-R(C.D. Cal. 1979), *aff'd in part, vac'd in part*, 650 F.2d 1127 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982) (table) (hereinafter "*California State Board of Equalization*") permanently enjoining the California State Board of Equalization from collecting sales taxes on United States government lease transactions in California as of December 31, 1979?

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REDDING FORD, a corporation,
Petitioner,

vs.

CALIFORNIA STATE BOARD OF EQUALIZATION,
an agency of the State of California,
GEORGE R. REILLY, ERNEST J. DRONENBURG, JR.,
WILLIAM M. BENNETT, RICHARD NEVINS and KENNETH CORY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Redding Ford petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on December 16, 1983.

OPINIONS BELOW

The opinion of the court below is not yet published and is reprinted as Appendix A. The memorandum of decision of the district court is not officially published and is reprinted as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the district court was based on 28 U.S.C. §§ 1331 and 1343.

STATUTE INVOLVED

The statute involved is 28 U.S.C. § 1341 which provides:

“The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner's complaint in the district court sought to obtain (i) a judicial declaration on the validity, under the Federal Constitution, of sales or use taxes assessed by the California State Board of Equalization and (ii) an injunction restraining respondents from collecting the deficiency assessment.

The complaint alleged that the deficiency assessment was an attempt to tax leases of tangible personal property to an instrumentality of the Federal Government (i.e., the United States Department of Agriculture); was in violation of the sovereign immunity of the United States from state taxation provided by the Constitution; and, in addition, was arbitrary, discriminatory and invalid under the Fourteenth Amendment to the Constitution. A copy of petitioner's complaint is reprinted as Appendix C.

Petitioner filed a motion for a preliminary injunction in the district court, pursuant to Rule 65(a) and (b) of

the Federal Rules of Civil Procedure, on the grounds that respondents' seizure of all of petitioner's assets would immediately and irreparably damage petitioner in that it would destroy petitioner's business and deprive petitioner of any assets with which to challenge the validity of the deficiency assessment in any forum.

Respondents filed a motion to dismiss the action, pursuant to Rule 12 of the Federal Rules of Civil Procedure, asserting that the district court lacked subject matter jurisdiction of the complaint under the provisions of 28 U.S.C. § 1341 in that the action sought an injunction against the collection of state taxes for which a "plain, speedy and efficient" state remedy existed.¹

The district court (Hon. William A. Ingram) granted respondents' motion to dismiss, ruling that (i) California law provided a "plain, speedy and efficient" remedy under its tax refund procedure and consequently the action was barred by § 1341, and (ii) petitioner could not invoke the district court's jurisdiction to enforce the injunctive decree entered in *California State Board of Equalization* because to do so would improperly circumvent the prohibition of § 1341. (Appendix B)

Petitioner filed its notice of appeal to the court below on March 7, 1983.

¹Respondents moved to dismiss also on the ground that the action was barred by the Eleventh Amendment to the United States Constitution; the district court granted the motion as to the Board of Equalization but denied it as to the individual members of the Board and none of the parties appealed the court's ruling in this respect.

On appeal petitioner challenged both of the district court's rulings. It contended, as to the first ruling mentioned above, that petitioner had no remedy under California law within the meaning of § 1341—and certainly no "plain, speedy and efficient" remedy under that provision—since it could not invoke the California refund procedure and California provided no alternative remedy, under the reasoning of *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976) and decisions of other circuits. Petitioner argued that the decisions of this Court in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981) and *California v. Grace Brethren Church*, 457 U.S. 393 (1982), holding that state statutory refund procedures may constitute a "plain, speedy and efficient" remedy within the meaning of § 1341, did not apply because the taxpayers in both of those cases in fact could invoke the state refund procedures in question whereas here petitioner could not; furthermore, the reasoning of those decisions fully supported petitioner's contentions in that *Rosewell* clearly had stated, before § 1341 could be applied, states had to provide minimal procedures which taxpayers could invoke, and petitioner had none under California law.

As to the second district court ruling mentioned above, petitioner contended that the district court in *California State Board of Equalization* had already enjoined the Board of Equalization from collecting the very taxes here in question at the behest of the United States; that petitioner should have the right to enforce the injunction since it was procured for petitioner's benefit, as well as the benefit of the United States; and that § 1341 did not bar jurisdiction of the district court below because none of the policy considerations or reasons underlying the

enactment of § 1341 existed. That is to say, enforcement of the decree at this time caused no proscribed "intrusion" into state fiscal matters since such intrusion, if any, had already taken place when the action was brought by the United States and it had been sanctioned by all three levels of the federal judiciary.

The court below affirmed the judgment of dismissal, rejecting all of petitioner's contentions, basing its decision on the jurisdictional prohibition of § 1341. It held essentially:

- (i) On the first question presented here for decision, that an inability to prepay the deficiency assessment and invoke the California refund procedure was not a sufficient reason to avoid applying § 1341 (Appendix A 2-3); and
- (ii) As to the second question presented here, petitioner could not enforce the decree entered in *California State Board of Equalization* because, although that action was brought by the United States which was not bound by the jurisdictional limitation of § 1341, petitioner remained subject to the bar of § 1341 and had failed to join the United States as a party in the district court (Appendix A 3-5).

B. Facts

Petitioner has been engaged in the car dealership business since 1944 in and around Redding, California. As an adjunct to its business, it leased, for short periods of time, motor vehicles to the United States Department of Agriculture prior to selling them in the regular course of its business.

In the early part of 1981, the Board of Equalization ("Board") conducted an audit of petitioner's business for the purpose of auditing the payment of sales and use taxes and thereafter determined that for the period January 1, 1978 through December 31, 1980, petitioner owed sales or use taxes on the leased vehicles in the amount of \$175,746.18 together with interest thereon in the amount of \$54,774.58. In August 1981, petitioner petitioned the Board for redetermination of the deficiency assessment, asserting as grounds for redetermination essentially the same grounds asserted in its complaint in the district court. The Board rejected petitioner's contentions and issued its ruling redetermining the deficiency assessment at that time in the aggregate amount of \$239,466. Thereafter the Board assessed a penalty of 10% of the assessment for failure to pay the tax. Interest has continued to accrue on the aggregate amount of the deficiency assessment, and the penalty, at a rate in excess of 10% per annum. Cal. Rev. & Tax Code § 6591. (Appendix C 9)

After issuing its Redetermination, the Board threatened to seize all of petitioner's assets, in partially collecting the tax, and petitioner filed its complaint in the district court and its motion for preliminary injunction. Petitioner alleged that the summary seizure of its assets would not only destroy its business but would effectively deprive it of the resources with which to challenge the validity of the tax assessment in any court. (Appendix C 12)

Petitioner did not have sufficient assets or resources with which to pay even substantially the amount of the deficiency assessment and filed its action in the district court because (i) petitioner could not comply with the requisites

of the California statutory refund procedure and thus invoke that procedure for challenging the assessment and (ii) California, by its constitutional, statutory and decisional law, prohibited alternative remedies whether or not destruction of a taxpayer's business was the consequence. (Appendix C 11)

It is appropriate to note that, to the extent the foregoing facts were "well pleaded," the courts below were required to assume they were true in ruling on the propriety of respondents' motion to dismiss. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 173-74 (1965); *Hillsborough T.P. v. Cromwell*, 326 U.S. 620, 625 (1946).

REASONS FOR GRANTING THE WRIT

A. First Question Presented: The Applicability of § 1341

The holding of the court below is in conflict with the explicit mandate of this Court in *Rosewell* that a state remedy must be provided to petitioner before § 1341 is held to bar petitioner's action in the district court. It also conflicts with the reasoning of other decisions of this Court as well as other circuit courts' construction of § 1341.

The Ninth Circuit based its holding essentially on an earlier decision of that court in *Wood v. Sargeant*, 694 F.2d 1159 (9th Cir. 1982):

"In *Wood v. Sargeant* . . . we reviewed the 'plain, speedy and efficient' exception and held that a demonstrated inability to pay a tax does not avoid the jurisdictional bar of section 1341. * * * *Wood* did not improperly extend *California v. Grace Brethren Church* . . . or *Rosewell v. LaSalle National Bank* * * * We are bound by *Wood*." (Appendix A 3)

Wood contains the Ninth Circuit's reasoning on the question presented here. Plaintiffs in *Wood* did not have sufficient assets to prepay a tax assessment and therefore sought a declaratory judgment and injunctive relief in the district court. The district court granted defendant's motion to dismiss under the prohibition of § 1341 and the Ninth Circuit affirmed. The court relied principally upon *Rosewell*. It noted first that this Court had found the taxpayer in *Rosewell* had a plain, speedy and efficient remedy under the Illinois refund statute, although the statute did not provide for the payment of interest, and went on to conclude:

"We think that the same can be said of a construction of § 1341 that would permit every state taxpayer who asserted or demonstrated an inability to pay the amount of the assessed tax to go into federal court to attack the tax. The potential of such a construction for obstructing the collection of state and local taxes, and for disrupting the orderly administration of the tax laws of the state, is great. We do not think that the Congress intended such a result. As the Court pointed out in *Rosewell*, the Congress knew when it adopted § 1341 in 1937 'that state tax systems commonly provided for payment of taxes under protest with subsequent refund as their exclusive remedy.' (p. 523, 101 S.Ct. at p. 1234) We cannot believe that Congress thought that the barrier to federal suits that it was erecting would have in it a door to the federal courts so wide as to admit *every impecunious or financially distressed taxpayer, or that the Supreme Court would open such a door.* (p. 1161; emphasis added.)

Petitioner respectfully disagrees with the Ninth Circuit's interpretation of the holding in *Rosewell* for several

reasons. First, *Rosewell* clearly is not authority for the proposition that a state refund procedure satisfies § 1341 even if a taxpayer cannot prepay the tax and invoke the procedure. An express premise of *Rosewell* was that the taxpayer in that action could *in fact* invoke the state procedure:

“There is no doubt that the Illinois state court refund procedure provides the taxpayer with a ‘full hearing and judicial determination’ at which *she* may raise any and all constitutional objections to the tax.” (450 U.S. at 514; emphasis added.)

Second, while the Court in *Rosewell* was divided five to four, it appears that all of the Justices concurred in the Court’s categorical statement:

“We explicitly state that a state remedy *must* ‘provid[e] the taxpayer with a “full hearing and judicial determination” at which *she* may raise any and all constitutional objections to the tax.’” (450 U.S. at 515 n. 19; emphasis added.)

Here, petitioner may not invoke *any* California remedy. *Wood v. Sargeant, supra*, 694 F.2d at 1159 (“The [California] judicial remedy could be invoked only by first paying the tax. Cal. Const. Art. 13, § 32 . . .”).

Third, this Court in *Rosewell*, while applying a restrictive interpretation to § 1341, held:

“Because the Illinois remedy imposes *no unusual hardship* on [the taxpayer] requiring ineffectual activity or an unnecessary expenditure of time or energy, we cannot say that it is not ‘efficient.’” (450 U.S. at 518; emphasis added.)

The hardship on petitioner is evident: An inability to prevent the destruction of its business; the loss of resources with which to obtain an adjudication on the validity of the deficiency assessment under the Federal Constitution in any forum, state or federal. To avoid these consequences, petitioner must have the ability not only to invoke the state refund procedure but also the right to obtain a preliminary injunction to preserve its business during the course of adjudication. Petitioner can do neither under California law.

For these same reasons, the Ninth Circuit's reliance on *Grace Brethren* is misplaced. *Grace Brethren* essentially extended the reasoning of *Rosewell* to an action seeking declaratory relief and premised its holding on the *fact* that the taxpayer in that action could invoke the California refund procedure, noting that there ". . . is no dispute that [plaintiffs] in the present cases can seek a refund of the . . . tax through . . . [California] judicial procedures." 457 U.S. at 413.

In applying § 1341, the Ninth Circuit also erroneously relied, by way of analogy, upon decisions construing the *federal* anti-injunction statute (Internal Revenue Code § 7421(a)), including *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962). *Wood*, *supra*, 694 F.2d at 1161. But the federal anti-injunction statute is not analogous in any respect to § 1341, nor are the cases construing it. The federal statute does not contain any exception such as the "plain, speedy and efficient" exception found in § 1341. The materiality of this distinction—i.e., the distinction between the absolute prohibition contained in the federal anti-injunction statute and the limited prohibition of § 1341—

is discussed in *Enochs*. *Enochs* distinguished § 1341 from the federal anti-injunction provision, concluding that if Congress had intended an exception to the federal anti-injunction provision, it specifically would have said so as it had done in § 1341 by inclusion of the “plain, speedy and efficient” exception. 370 U.S. at 6.

The Ninth Circuit has mistakenly reasoned that if the destruction of a taxpayer’s business does not prevent application of the federal anti-injunction statute, such facts should not prevent the application of § 1341. It has failed to draw the very distinction between the text of the two statutes articulated in *Enochs*. Is not the unavailability of a state remedy to prevent the destruction of a taxpayer’s business an “unusual hardship”—a deprivation of minimal procedural safeguards—within the meaning of *Rosewell*, precluding the application of § 1341? *Rosewell, supra*, 450 U.S. at 512, 516-18; *Grace Brethren, supra*, 357 U.S. at 411-12. See *Nat. Carriers’ Conference v. Heffernan*, 440 F.Supp. 1280, 1982-83 (D.C. Conn. 1977) (the district court declined to apply § 1341 in part because it found the Connecticut remedy inadequate based on doubt whether the State court would assume jurisdiction, the existence of a ten percent tax penalty, and the right of the State taxing body to seize summarily the taxpayer’s assets without prior judicial determination possibly causing a “serious disruption of [plaintiff’s] activities.”)

In finding that the inability to invoke the refund procedure was not a sufficient reason for avoiding the bar of § 1341, the Ninth Circuit declined to evaluate properly the penalty aspect of the tax assessment, pleaded by petitioner, and its effect on petitioner’s inability to prepay the assessment. The tax assessment constitutes a severe

penalty, as applied to petitioner, in that the assessment is measured by the total cost of the leased vehicles to petitioner rather than the amount of rental payments received by petitioner from the Department of Agriculture. Petitioner's cost bears no reasonable relationship to, and greatly exceeds, the lease proceeds petitioner in fact received. The average length of the leases to the Department of Agriculture was only six months. (Appendix C 9, ¶ 15) The effective rate of the tax assessment is twenty percent of the gross rentals received by petitioner under the leases, rather than the prescribed six percent rate for sales or use taxes under California law. (Appendix C 12, ¶ 11.) This method of calculating the tax adopted by respondents, together with the ten percent penalty imposed because petitioner could not pay the tax assessment, added greatly to petitioner's inability to prepay the tax assessment and invoke the refund procedure. Requiring the taxpayer to prepay such penalties as a condition for invoking the only state remedy should constitute an "unusual hardship" within the meaning of *Rosewell*; it does not meet the "efficient" requirement of § 1341.

See *Denton v. City of Carrollton*, 235 F.2d 481, 485 (5th Cir. 1956) (declining to apply § 1341, finding that the payment of a large sum of money as a condition to testing the validity of a tax punitive in nature presented "such a heavy burden that to decline equitable relief would be to deny judicial review altogether"); *Garrett v. Bamford*, 538 F.2d 63, 70-72 (3rd Cir. 1976), cert. denied, 429 U.S. 977 (1976) (holding § 1341 did not apply because, *inter alia*, Pennsylvania remedies "would impose substantial expense on plaintiffs' efforts to prove their case").

The holding below causes serious confusion on the meaning and application of this Court's decision in *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976) and among circuit court decisions. In *Tully*, a case very similar on its facts to those at bench, the plaintiff sought to enjoin the collection of New York sales taxes. Defendants objected to the district court's jurisdiction, citing § 1341. A three-judge district court held that § 1341 did not bar federal jurisdiction when the New York refund procedure could not be invoked by a taxpayer because of insufficient funds and there were no other adequate alternative remedies available under New York law. This Court reversed, applying § 1341, but only after determining that New York law provided taxpayers the right to challenge the constitutionality of tax assessments, prior to the payment of the tax, by suits for declaratory relief. 429 U.S. at 74-75. The decision noted that the taxpayer could protect itself by preliminary injunction during the pendency of its suit. 429 U.S. at 75-76. While this Court did not deem it necessary to consider the adequacy of the New York refund procedure (presumably because the procedure could not be invoked by the taxpayer, see 429 U.S. at 76 n 8) the import of *Tully* is that when insufficient assets prevent a taxpayer from invoking a state refund procedure, § 1341 is not applicable unless state law provides an alternative remedy. So noted the First Circuit's decision in *Ludwin v. City of Cambridge*, 592 F.2d 606 (1st Cir. 1979). Citing *Tully*, the court stated:

“Where a refund procedure is not available to a taxpayer due to *insufficient funds*, the *dispositive consideration* whether a federal court will entertain the suit is the availability of other avenues in the state court to present the taxpayer's federal claims and obtain relief.” (p. 609; emphasis added.)

See also *28 East Jackson Enterprises, Inc. v. Cullerton*, 523 F.2d 439, 441-42 (7th Cir. 1975), *cert. denied*, 423 U.S. 1073, *reh. denied*, 424 U.S. 959 (1976), which the Ninth Circuit expressly declined to follow in *Wood*. 694 F.2d at 1161.

There is a conflict between the Ninth Circuit's reasoning in the holding below and its recent decision in *Capital Industries-Emi, Inc. v. Bennett*, 681 F.2d 1107 (9th Cir. 1982), *cert. denied*, 455 U.S. 943 (1982). In *Bennett*, the application of § 1341 was considered in two companion cases. In one of the cases, the Ninth Circuit reversed the trial court's dismissal under § 1341 on the ground that the taxpayer did not have an adequate judicial remedy within the meaning of § 1341. In commenting on § 1341, the court stated:

“A state refund action, however, does not constitute an adequate remedy in all situations. ‘Special circumstances’ may render such an action ‘of doubtful efficiency,’ in which case jurisdiction in federal courts is *not* excluded. * * * The *inability of the taxpayer to pay a proposed assessment* may constitute such a ‘special circumstance.’ See *Denton v. City of Carrollton*, 235 F.2d 481, 485 (5th Cir. 1956) (assessment may pose such a heavy burden that to deny equitable relief is to deny judicial review).” (p. 1114 n 20; emphasis added.)

Cf. *Matthews v. Rodgers*, 284 U.S. 521, 528 (1932) (a pre-section 1341 decision in which this Court, after holding that the district court did not have equitable jurisdiction to entertain an action to invalidate a state tax because the state remedy for refund afforded an adequate legal remedy, nevertheless qualified its decision by adding: “. . . in the absence of allegations in the bill, which are wanting here, of special circumstances showing *inability of the taxpayer to pay the tax*. . . .” (emphasis added.))

The decision below did not give proper weight to two factors, pleaded by petitioner, in applying § 1341. One is the threatened loss of petitioner's good will and the other is the threatened loss of its franchise agreement with Ford Motor Company—two valuable intangible assets which petitioner cannot protect without an injunction *pendente lite*. California courts are prohibited by the California Constitution from granting such relief. California Constitution, Article XIII, § 32; California Revenue and Taxation Code, § 6931; see *California v. Grace Brethren Church, supra*, 457 U.S. at 400 n 10 (1982). The inability of petitioner to protect itself against the probability of such losses alone constitutes a sufficient basis to bar the application of § 1341. In *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299 (1952), this Court declined to apply § 1341, in a suit to enjoin a collection of state taxes, holding that the state refund remedy was not plain, speedy or efficient when it did not allow the taxpayer to recover all of the taxes paid —i.e., the taxpayer could not be compensated by the state remedy for all of its loss. 342 U.S. at 302-303.

This case presents the Court with the opportunity of resolving the foregoing conflicts and confusion in the interpretation of § 1341 and to set the limitations to be imposed in applying the section in two significant and important areas: inability and hardship in prepaying taxes necessary to invoke state refund procedures and the unavailability of preliminary injunctive relief in state courts when irreparable injury is threatened.

The defenselessness of petitioner's position under California law cannot be overstated. It is illustrated by *Modern Barber Col. v. Cal. Emp. Stab. Com.*, 31 Cal.2d 720 (1948)

in which the California Supreme Court held—even though a taxpayer did *not* have an adequate remedy—that California courts could not grant any remedy having the effect of restraining the collection of taxes:

“. . . the [California] Constitution does not give the appellate courts the jurisdiction to issue an injunction, and . . . to issue an injunction in guise of some other writ . . . would constitute an unconstitutional interference with the jurisdiction granted to the trial courts, as well as an unconstitutional enlargement of the jurisdiction of the appellate courts.” (p. 730)

* * *

“The [taxpayer’s] allegation that payment of the claims asserted against it will render it insolvent is one which could be made against any tax and can have no relevancy in a situation where this court, by express legislative provision, is prohibited from interfering in advance of payment of the tax. The argument that compliance with the statute may *cause hardship* in some instances is one which can be addressed only to the legislature.” (p. 732; emphasis added.)

The dissenting opinion in *Modern Barber* highlights the problem facing petitioner under California law:

“The majority opinion holds that the respondent commission has the absolute right and the power to cause petitioner’s assets to be summarily sold at public auction in order to collect from petitioner the illegal [tax]. . . .” (p. 733)

and

“. . . [the majority opinion holds] that the courts of this state are without *power* to stay or in any way interfere with the collection of the illegally [assessed taxes] even though admittedly such collection will

force petitioner into ‘receivership and bankruptcy.’ ” (p. 734; emphasis added.)

Granted there is an announced Congressional policy against interference with states’ tax collection processes, but does not the inclusion of the “plain, speedy and efficient” exception in § 1341 announce a dominant federal policy of providing an effective forum to *every* taxpayer, if not in state courts, then in the federal district court?

Contrary to the reasoning of the Ninth Circuit, impecunious taxpayers should be entitled to the same procedural due process as pecunious taxpayers in challenging state tax assessments under the Federal Constitution. In the Congressional Record, Senator Bone “emphasized” that § 1341 “does not take away any equitable right of a taxpayer or deprive him of a day in court” and that the provision was not intended to bar federal district courts of jurisdiction unless state law “assured” taxpayers the right to a full hearing and a judicial determination. 81 Cong. Rec., p. 1416 (1937); see also, S. Rep. No. 1035, 75th Cong., 1st Sess, 2 (1937); H.R. Rep. No. 1053, 75th Cong., 1st Sess, 2 (1937).

Particularly applicable here are this Court’s most recent remarks in *Grace Brethren*:

“This Court has not *hesitated* to declare a state refund provision *inadequate* to bar federal relief if the taxpayer’s opportunity to raise his constitutional claims in the state proceedings is *uncertain*.” (457 U.S. at 414 n 31; emphasis added.)

Petitioner’s remedies under California law at best are uncertain.

B. Second Question Presented: The Enforceability of the Judgment in California State Board of Equalization

The question of whether the district court below had jurisdiction to enforce the decree entered in *California State Board of Equalization* presents an important question of federal law which has not been, but should be, settled by this Court. Does a district court not have jurisdiction to enforce an injunction entered in the same judicial district because of the prohibition provided in § 1341?

The judgment of the district court, entered in December 1979, provides:

“It is hereby further ORDERED, ADJUDGED AND DECREED that the defendant [California State Board of Equalization] is permanently enjoined from collecting the sales or use tax on United States government lease transactions in California as of December 31, 1979.” (Appendix C 20)²

The facts pleaded in plaintiff’s complaint bring the Board’s deficiency assessment squarely within the prohibition of this injunction. Leases of passenger vehicles constitute “sales” within the meaning of the California Sales and Use Tax Laws. California Revenue and Taxation Code, § 6006(g) (“ ‘Sale’ means and includes: . . . Any lease of tangible personal property in any manner or by any means whatsoever. . . .”).

The Ninth Circuit found that the district court below had neither independent nor ancillary jurisdiction to en-

²Petitioner has been informed that, by stipulation of the parties after affirmance of the judgment by the Ninth Circuit, the words “or use” were deleted; the deletion, however, does not affect petitioner’s contention in support of this petition.

force the judgment. (Appendix A 3-4) On the question of independent jurisdiction, the court reasoned that assuming there was an “identity of interest” between petitioner and the United States, petitioner nevertheless could not enforce the judgment because joinder of the United States as a party was necessary before a “federal instrumentality” could overcome § 1341. (Appendix A 4-5)

Assuming, *arguendo*, that the United States should have been made a party, the court still should not have affirmed the judgment of dismissal for lack of jurisdiction under § 1341. The district court’s judgment was entered “with prejudice.” (Appendix B 7) The effect of the court’s affirmation is to deny permanently petitioner’s right to invoke federal jurisdiction on its claim. Petitioner should have been given an opportunity to join the United States. This question was never raised, nor argued, in the district court nor in the court of appeals by any party.

Petitioner does not claim to be an “instrumentality” of the federal government. It is a third-party beneficiary of the judgment in question in effect. The interests of the United States and petitioner are identical: to thwart the attempt by the Board to collect sales taxes on leases of tangible personal property to federal government instrumentalities. Petitioner’s right to enforce the judgment in *California State Board of Equalization* is derived through the United States. Under California law, the tax is imposed upon the lessee but is collected through the lessor; it operates directly and immediately upon petitioner as the lessor. Permitting petitioner to enforce the injunction in the first instance is an effective and practical means of furthering the federal policy of prohibiting state taxation upon federal

government instrumentalities. See *Diamond National Corp. v. State Board of Equalization*, 425 U.S. 268 (1976); *United States v. State Board of Equalization*, 536 F.2d 294 (9th Cir. 1976).

As the lessor, petitioner has a continuing and vested interest in preventing the state from collecting unconstitutionally imposed taxes, which interest remains long after it has committed itself not to charge sales or use taxes in leases and long after petitioner's leases have been performed and have terminated. At that point, is the United States' interest sufficient to require its joinder (as distinguished from a non-jurisdictional requirement of having to notify the United States of the filing of the action so that it can intercede if it desires to do so)? The sheer number of leases entered into each year suggests that a jurisdictional joinder requirement is both impractical and excessive.

Petitioner submits the court's holding that § 1341 barred the district court's subject matter jurisdiction—at least without having had an opportunity to join the United States—constituted an improper extension of the jurisdictional limitation of § 1341.

CONCLUSION

For the reasons set forth above, petitioner respectfully asks the Court to grant this petition for certiorari.

March 5, 1984.

Respectfully submitted,

WILLIAM L. SCOTT

Counsel for Petitioner

(Appendices follow)

Appendix A

**In the United States Court of Appeals
For the Ninth Circuit**

No. 83-1799

Dist. Ct. No. C-82-352-WAI

**Redding Ford, a corporation,
Plaintiff-Appellant,**

vs.

**California State Board of Equalization,
an agency of the State of California,
George R. Reilly, Ernest J. Dronnenburg, Jr.,
William M. Bennett, Richard Nevis, and Kenneth Cory,
Defendants-Appellees.**

OPINION

[Filed Dec. 16, 1983]

**On appeal from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding**

Argued and submitted November 18, 1983

**Before: DUNIWAY, TIMBERS,* and SKOPIL, Circuit
Judges**

SKOPIL, Circuit Judge:

Redding Ford appeals the dismissal of its action for declaratory and injunctive relief from the collection of

*The Honorable William H. Timbers, United States Circuit Judge for the Second Circuit, sitting by designation.

state taxes. The district court dismissed for lack of subject matter jurisdiction. On appeal, Redding Ford argues that (1) the Tax-Injunction Act, 28 U.S.C. § 1341, did not bar jurisdiction or (2) the federal court had ancillary jurisdiction to hear the case. We affirm.

Facts and Proceedings Below

As part of its business, Redding Ford leased new motor vehicles to the federal government. Appellees, members of the state Board of Equalization, determined that Redding Ford owed sales and use taxes on the lease agreements. Redding Ford unsuccessfully argued to the Board that the assessment constituted a tax on an instrumentality of the United States and accordingly violated the constitutional intergovernmental immunity against such taxation.

Redding Ford did not pursue additional remedies under state law which provide for payment of the disputed taxes followed by a claim for refund, Cal. Rev. & T. C. §§ 6901-6908, or a suit for refund in state court, Cal. Rev. & T. C. §§ 6931-6937. Instead, Redding Ford filed suit in federal district court alleging that it did not have sufficient assets to prepay the tax assessment and seek a refund.

Discussion

A. Standard of Review

A dismissal based on lack of subject matter jurisdiction is freely reviewable on appeal. *Societe de Conditionnement v. Hunter Engineering*, 655 F.2d 938, 941-42 (9th Cir. 1981).

B. Tax Injunction Act

The Tax Injunction Act, 28 U.S.C. § 1341, provides that district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law

where a plain, speedy and efficient remedy may be had in the courts of such State." Redding Ford argues that it has no "plain, speedy and efficient" remedy under state law and therefore federal jurisdiction is not precluded. Specifically, it claims that California's prepay refund requirement, Cal. Constitution, Art. XIII, § 32 and Cal. Rev. & T. C. §§ 6901-08; 6931-37, prevents state relief since Redding Ford does not have sufficient assets to pay the assessments.

In *Wood v. Sargeant*, 694 F.2d 1159, 1160 (9th Cir. 1982), we reviewed the "plain, speedy and efficient" exception and held that a demonstrated inability to pay a tax does not avoid the jurisdictional bar of section 1341. The dictum in *Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1114 n.20 (9th Cir.), cert. denied, 455 U.S. 943 (1982) does not compel a different result. Furthermore, *Wood* did not improperly extend *California v. Grace Brethren Church*, 457 U.S. 393 (1982) or *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). In both cases, the Court recognized that Congress intended to prevent federal court interference with the assessment and collection of state taxes. *Grace Brethren*, 457 U.S. at 411; *Rosewell*, 450 U.S. at 522-23. The Court refused to read expansively what Congress intended to be a narrow exception. *Rosewell*, 450 U.S. at 524. We applied this same reasoning in *Wood*, 694 F.2d at 1160-61. We are bound by *Wood*. See *LeVick v. Skaggs Companies, Inc.*, 701 F.2d 777, 778 (9th Cir. 1983) (unless there is intervening Supreme Court authority or *en banc* review, the holding of a prior panel is controlling authority).

C. Ancillary Jurisdiction

Redding Ford argues that the lower court had jurisdiction independent of section 1341. It contends such juris-

tion is ancillary and is derived from the lower court's prior judgment in *United States v. California State Board of Equalization*, No. 79-03359-R (C.D. Cal. 1979), *aff'd in part, vac'd in part*, 650 F.2d 1127 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982) (table). We find no basis for ancillary jurisdiction. Such jurisdiction typically involves claims by a defending party brought into court against its will, or by another person whose rights might be irretrievably lost unless she could insert them in an ongoing federal action. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978). Ancillary jurisdiction cannot be extended beyond the claims asserted in one action. *E.g., Fidelity & Cas Co. v. Reserve Insurance Co.*, 596 F.2d 914, 918 (9th Cir. 1979).

Redding Ford argues that the district court had the authority to enforce its prior decree enjoining the collection of a tax against the United States. That action was brought by the United States which, unlike Redding Ford, is not bound by the jurisdictional limitation of section 1341. *Department of Employment v. United States*, 385 U.S. 355, 358 (1966). Redding Ford argues that there is an "identity of interest" between it and the United States sufficient to allow Redding Ford to assert the federal interest in federal court. We rejected that argument in *Housing Authority v. Washington*, 629 F.2d 1307, 1310-11 (9th Cir. 1980). There, a local housing authority, whose funding and general policy were provided by the United States, sought to enjoin the collection of taxes and to obtain a refund of taxes paid. The taxes had been previously declared unconstitutional by the same district court. *United States v. State of Washington*, No. C77-355V (W.D. Wash. 1977), *aff'd*, 654 F.2d 570 (9th Cir. 1981), *rev'd*, U.S., 103 S.Ct. 1344 (1983). The

lower court found the housing authority to be a federal instrumentality. The court ordered affirmative relief. We reversed, holding that joinder of the United States was necessary before a federal instrumentality could overcome section 1341. *Housing Authority*, 629 F.2d at 1311. We based our holding on "the strong policy of noninterference with state taxation procedures codified by § 1341, and upon the rationale . . . that the basis of the federal instrumentality doctrine is the presence of the United States as a party." *Id.*

Finally, Redding Ford relies on *Dickey v. Turner*, 49 F.2d 998 (6th Cir. 1931). *Dickey* involved an alleged fraud on the courts and a second action that included the same parties. Redding Ford's action is by a different plaintiff and involves a different tax than was litigated in the prior action. Furthermore, unlike *Dickey*, we are faced with a statute that specifically prohibits federal jurisdiction. See *Kelly v. Springett*, 527 F.2d 1090, 1094 (9th Cir. 1975) (suits brought under an independent jurisdictional statute such as 42 U.S.C. § 1983 are still subject to the proscription of section 1341).

CONCLUSION

The Tax Injunction Act, 28 U.S.C. § 1341, bars jurisdiction since Redding Ford has a "plain, speedy and efficient" state remedy. No other basis for jurisdiction exists.

The decision of the district court is AFFIRMED.

Appendix B

In the United States District Court
for the Northern District of California

No. C-82-3520-WAI

Redding Ford, a corporation,
Plaintiff,

v.

California State Board of Equalization, an agency
of the State of California, George R. Reilly,
Ernest J. Dronenburg, Jr., William M. Bennett,
Richard Nevins and Kenneth Cory,
Defendants.

[Filed Feb. 24, 1983]

Memorandum of Decision

This action is DISMISSED for want of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1).

The remedy provided by California law as set forth in Revenue and Taxation Code §§ 6901 *et. seq.*, is plain, speedy and efficient within the meaning of the tax anti-injunction statute, 28 U.S.C. § 1341, and this Court therefore lacks jurisdiction of this cause. *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981); *California v. Grace Brethren Church*, U.S. , 73 L.Ed.2d 93 (1982); *Wood v. Sergeant*, 694 F.2d 1159 (9th Cir. 1982).

The action is barred as to the defendant California State Board of Equalization by the provisions of the Eleventh Amendment, *Alabama v. Pugh*, 438 U.S. 781 (1978); *V.O.*

Motors, Inc. v. California State Board of Equalization, 691 F.2d 871 (9th Cir. 1982), but not as to the individually named defendants, to whom the protection of the Eleventh Amendment does not extend, at least where the relief sought is prospective only. *Ex Parte Young* 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Georgia Railroad and Banking Co. v. Redwine*, 342 U.S. 299 (1952).

The Eleventh Amendment was not congressionally abrogated by the enactment of 28 U.S.C. § 1341. *V.O. Motors, Inc.*, *supra*.

Plaintiff's invocation of the ancillary jurisdiction of this Court based upon the judgment rendered in *United States v. California State Board of Equalization*, (CDCA No. 79-03359-R), is rejected by this Court. To hold otherwise would be to improperly circumvent the effect of § 1341.

The action is DISMISSED with prejudice.

DATED: 2 24 83

/s/ William A. Ingram
United States District Judge

Appendix C

WILLIAM SCOTT, ESQ.
2470 El Camino Real
Palo Alto, CA 94306
(415) 857-1100
Attorney for Plaintiff

United States District Court
Northern District of California

No. C-82-352-WAI

Redding Ford, a corporation,
Plaintiff,

v.

California State Board of Equalization, an agency
of the State of California, George R. Reilly,
Ernest J. Dronenburg, Jr., William M. Bennett,
Richard Nevins and Kenneth Cory,
Defendants.

Complaint for Declaratory and Injunctive Relief
Re Validity and Collection of Sales and Use Taxes

Plaintiff complains and alleges:

1. Jurisdiction of the Court is invoked under 28 U.S.C. §§ 1331 and 1343, and this Court's pendant and ancillary jurisdiction. The matter in controversy exceeds \$10,000, exclusive of interest and costs, and arises under the Constitution and laws of the United States, especially, the constitutional intergovernmental immunity of the United States against state taxation and the due process and equal

protection clauses of the Fourteenth Amendment to the United States Constitution.

2. Plaintiff is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the state of California.

3. Defendant State Board of Equalization (hereinafter "Board") is an agency of the state of California authorized and responsible for the assessment and collection of the California sales and use taxes including parts 1, 1.5 and 1.6 of Division 2 of the California Revenue and Taxation Code and the rules and regulations promulgated thereunder (hereinafter collectively "Tax Code").

4. Defendants Reilly, Dronenburg, Bennett, Nevins and Cory are, and at all times herein mentioned were, the duly appointed members of the Board.

5. At all times herein mentioned since approximately 1944, plaintiff was a Ford Motor Company automobile dealer engaged in the business of purchasing from the manufacturer and selling motor vehicles in the State of California and, as an adjunct thereto since prior to 1978, was engaged in the business of leasing new motor vehicles to the Department of Agriculture of the United States for short periods of time (averaging six months or less), prior to the resale of the vehicles.

6. Over the years of the conduct of its business, plaintiff has acquired substantial goodwill constituting a valuable intangible asset of its business. Plaintiff conducts its dealership business pursuant to a Ford Motor Company franchise agreement which provides, inter alia, that in the event substantially all of plaintiff's assets are lost or seized, or

plaintiff becomes insolvent, Ford Motor Company may unilaterally terminate said franchise agreement. In the event said franchise agreement is terminated, plaintiff is informed and believes and upon such information and belief alleges that substantially all of the value of its goodwill will be destroyed and it thereafter will have no, or only nominal, value.

7. During the period January 1, 1978 through December 31, 1980, plaintiff leased certain passenger vehicles to the Department of Agriculture of the United States. Said leased vehicles at all times were purchased and held by plaintiff in the regular course of plaintiff's business primarily for resale and were resold by plaintiff in the regular course of its business after their respective leases terminated. Said leases constituted sales of tangible personal property within the meaning of § 6006(g) of the Tax Code.

8. Plaintiff paid no sales or use taxes to the Board when said vehicles were leased since plaintiff believed in good faith that said leases were not subject to sales or use tax imposed by the state of California because the leases were entered into with an instrumentality of the United States and were exempt from said taxes under the intergovernmental, constitutional immunity of the United States. Plaintiff based its belief on the decision of the United States District Court (for the central district of California) in *United States v. State Board of Equalization* (unreported) Civil Action No. 72-2568-R, affirmed, 536 F. 2d 294 (9th Cir. 1976). Had plaintiff believed sales or use taxes would be assessed on said leases by the Board, it would have elected the fair rental value of said leases as the tax measure; the fair rental value of each of said leases

amounted to only a small fraction of the purchase price of the vehicle leased.

9. In the early part of 1981, the Board conducted an audit of plaintiff's business for the purpose of auditing the payment of sales and use taxes and thereafter determined that for the period January 1, 1978 through December 31, 1980, plaintiff owed sales and/or use taxes (including local taxes) in the amount of \$175,746.18 together with interest thereon in the amount of \$54,774.58, with respect to said leases. On or about August 7, 1981, plaintiff petitioned the Board for redetermination of a portion of said assessment in the amount of \$169,135.74 asserting as grounds for redetermination, *inter alia*, that the assessment constituted a tax on a instrumentality of the United States and violated the United States Constitution and, in addition, was arbitrary, and discriminatory and invalid under the Fourteenth Amendment to the United States Constitution. Thereafter, the Board issued its ruling redetermining said deficiency assessment in the amount of \$169,135.74 in taxes, together with interest thereon in the amount of \$70,330.46, totalling \$239,466.20 as of May 28, 1982. A copy of the *Board's Notice of Redetermination* is attached hereto, marked exhibit "A" and made a part hereof.

10. Plaintiff does not have sufficient assets with which to pay all or substantially all of said tax assessment. Plaintiff is not able to pay said taxes and seek refund as provided and required by the California Constitution, Article XIII, § 32, and §§ 6901 *et seq.* of the tax code. Plaintiff has exhausted its administrative remedies for contesting the validity of said tax determination and does not have a plain, speedy and efficient state court remedy.

11. Said taxes constitute a penalty, and are invidiously discriminatory, in that they exceed (without adding interest or penalties) 20% of the gross rentals received by petitioner under the leases upon which the taxes are asserted to be due.

12. Defendants have demanded payment of said taxes forthwith and threatened to levy and collect said tax assessment through the Board's summary processes and to assess a penalty in the amount of \$16,913.57 if said tax assessment is not paid by June 27, 1982. Plaintiff will be irreparably injured by defendants attempt to collect said taxes in that it will cause (i) a forced liquidation of plaintiff's assets, (ii) the insolvency and destruction of plaintiff's business, (iii) upon information and belief, the termination of its said franchise agreement with the Ford Motor Company and the loss of plaintiff's goodwill and (iv) plaintiff to be unable to maintain any action to contest the validity of said tax assessment.

Second Claim

13. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 12 hereof.

14. On or about September 6, 1974, the District Court in *United States v. State Board of Equalization*, entered its Judgment in Civil Action No. 72-2568-R, unreported, and entered its Amended Judgment *nunc pro tunc* on October 21, 1975, adjudging in part:

"With respect to leases to the United States, for purposes of Federal Constitutional immunity, the legal incidence of the sales tax imposed by Parts 1, 1.5, and 1.6 of Division 2 of the California Revenue and Tax-

tion Code and the rulings and regulations issued thereunder falls and always has fallen on the United States as lessee whether United States is contractually obligated to reimburse its lessors for the tax or not and, therefore, the sales tax, insofar as it is imposed with respect to leases to the United States is illegal and void because it infringes the United States' immunity, under the Federal Constitution from state taxation.”
(¶ 2)

and:

“The sales tax provided for by Parts 1, 1.5, and 1.6 of Division 2 of the California Revenue and Taxation Code and the rulings and regulations issued thereunder is and was imposed with respect to leases of tangible personal property to the United States but is not and was not imposed with respect to other leases, including leases to the State of California, and therefore with respect to leases to United States, the sales tax is and was invidiously discriminatory against United States and its lessors in violation of the Federal Constitution.” (¶ 3)

Said Judgment was affirmed by the Court of Appeals, for the Ninth Circuit on May 7, 1976 (536 F. 2d 294) and is final.

15. On or about December 20, 1979, Judgment was entered in *United States of America v. California State Board of Equalization*, Civil Action No. 79-03359-R, decreeing in part that:

“It is hereby further ORDERED, ADJUDGED and DECREED that the defendant [California State Board of Equalization] is permanently enjoined from collecting the sales or use tax on United States Government lease transactions in California as of December 31, 1979.” (Paragraph 6, p.4)

A copy of said Judgment is attached hereto, marked Exhibit "B" and made a part hereof. Plaintiff alleges upon information belief that the parties to said action by stipulation deleted the word "or use" from said judgment. Said judgment was affirmed by the United States Supreme Court and is final (50 LW 3779).

16. A legal controversy exists by and between the parties hereto concerning their respective rights and obligations under and pursuant to the provisions of said injunction (Exhibit "B" hereto), and concerning the validity and collectibility of said tax assessment, in that:

a. Plaintiff claims and contends that (i) the imposition of sales or use taxes as redetermined by the Board (Exhibit A hereto) would violate the intergovernmental immunity from state taxation of the United States Constitution, (ii) the Board is collaterally estopped, and is barred by the doctrine of res judicata, from relitigating the determination that the legal incidence of California sales and use taxes with respect to leases of tangible personal property falls upon the lessee and, as sought to be imposed herein, said taxes are discriminatory and violate the United States Constitution, (iii) said tax assessment is invalid and contrary to the provisions of the Tax Code, (iv) defendant is and has been since December 31, 1979 enjoined and restrained from collecting from plaintiff said taxes by the prohibitory injunctive decree alleged in paragraph 15 hereof; (v) in the alternative plaintiff's remedy as provided and circumscribed by the Tax Code §§ 6901, *et seq.*, especially §§ 6903, 6931, 6932 and 6933, and Tax Code §§ 6738, 6757 and 6776 *et seq.*, especially 6796, and Article XIII, § 32, of the California Constitution, for contesting

the validity and collectibility of said taxes, is wholly inadequate and violates the substantive and procedural due process clauses of the Fourteenth Amendment to the United States Constitution; and (vi) in the alternative, the proper measure of the taxes sought to be imposed is the fair rental value of said leases rather than the purchase price of said leased vehicles; and

b. Plaintiff alleges upon information and belief defendants contend in all respects to the contrary.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follow:

- a. for a declaration of the respective rights and obligations of the parties in the premises;
- b. defendants be enjoined from assessing, levying and collecting said taxes; and
- c. such other relief as the Court deems proper.

Dated: July 7, 1982.

/s/ William Scott

William Scott

attorney for Plaintiff

Exhibit A

**State Board of Equalization
Department of Business Taxes**

P.O. Box 1799 Sacramento, California 95808
Santa Rosa Office (707) 576-2100

Redding Ford
P. O. Drawer 2395
Redding, CA 96001

Date: May 28, 1982

Account Number
SR JH 98-032349

Notice of Redetermination

You are hereby notified that the action indicated below was taken on your petition for Redetermination of Sales and Use Tax.

	Amount		
	Tax	Interest	Penalty
	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>
As Determined			
1-1-78 to 12-31-80 . .	\$175,746.18	\$54,774.58	\$230,520.76
Adjustment		15,555.88	15,555.88
As Redetermined	175,746.18	70,330.46	246,076.64
Less Payment 8-6-81 . . .	—6,610.44		—6,610.44
Balance Due	\$169,135.74	\$70,330.46	\$239,466.20

Interest has been calculated through 6-4-82; increase your payment by 83.41 for each day that payment is made after 6-4-82 to the date of payment.

Additional penalty of 16,913.57 if not paid by 6-27-82.

The Board concluded that petitioner was the consumer of mobile transportation equipment leased to the United States. The Board ordered that the tax be redetermined without adjustment.

cc: William Scott, Attorney at Law
2470 El Camino Real, Suite 108
Palo Alto, CA 94306

Exhibit B

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In the United States District Court for the
Central District of California

No. CV 79-03359-R

United States of America,
Plaintiff

vs.

California State Board of Equalization,
Defendants

[Filed Dec. 10, 1979]

JUDGMENT

This action having come on for hearing before the Court upon the motion of the plaintiff for partial summary judgment and the motions of the defendant, Honorable Manuel

L. Real, District Judge, presiding, and the issues having been duly heard and findings of fact and conclusions of law having been made, and good cause having been shown therefore,

It is hereby Ordered, Adjudged and Decreed that:

1. With respect to leases to the United States, for purposes of federal constitutional immunity, the determination of where the legal incidence of a tax falls is a federal question.
2. With respect to leases to the United States, for purposes of federal constitutional immunity, the legal incidence of the sales tax imposed by Parts 1, 1.5, and 1.6 of Division 2 of the California Revenue and Taxation Code ("Tax Code") and Section 1656.1 of the California Civil Code ("Civil Code") and the rulings and regulations issued thereunder falls and always has fallen on the United States as lessee whether the United States is contractually obligated to reimburse its lessors for the tax or not and, therefore, the sales tax, insofar as it is imposed with respect to leases to the United States is illegal and void because it infringes the United States' immunity, under the Federal Constitution, from state taxation.
3. The sales tax provided for by the Tax Code and Civil Code and the rulings and regulations issued thereunder is and was imposed with respect to leases of tangible personal property to the United States but is not and was not imposed with respect to other leases, including leases to the State of California, and therefore with respect to leases to the United States, the sales tax is and was invidiously discriminatory against the United States and its lessors in violation of the Federal Constitution.

4. Leases of tangible personal property made pursuant to General Services Administration (GSA) supply schedule contracts by contractors having cost-reimburseable contracts with the United States and having been authorized by the United States to use GSA schedule contracts were leases made by the contractor as agent of the United States for procurement purposes and, as such, were leases to the United States and were not subject to the California sales tax.

5. The California use tax is imposed without regard to whether the lessee is the user of the leased tangible personal property or not and, therefore, the imposition of the California use tax with respect to the use by non-lessee third-party contractors having cost-reimburseable contracts with the United States of tangible personal property leased pursuant to General Services Administration (GSA) schedule contracts on behalf of the United States by such contractors having been authorized by the United States to use GSA supply schedule contract is illegal and void because such imposition discriminates against the United States and its contractors in violation of the Federal Constitution .

6. The precise issue of unconstitutional discrimination presented in this action was decided in favor of the United States by this Court in the case of *United States v. State Board of Equalization*, Civil No. 72-2568-R C.D. Calif., Judgment entered September 6, 1974, unreported, Amended Judgment Nunc Pro Tunc entered October 21, 1975, unreported, affirmed in part, 536 F. 2d 294 (C.A. 9, 1976). That Judgment is now final and the issues finally decided by that Judgment were (1) that for purposes of federal immunity the legal incidence of the California sales tax falls upon the United States as lessee in violation of the constitutional

immunity of the United States from state taxation and (2) the imposition of sales tax with respect to leases to the United States—rather than the use tax, which is imposed with respect to other leases in California—unconstitutionally discriminates against the United States and its lessors. Although the Ninth Circuit in its decision at 536 F. 2d 294 only affirmed on legal incidence, both issues of legal incidence and discrimination were fully briefed and presented to the Court, and thus, the defendant is collaterally estopped from relitigating issues of unconstitutional discrimination already resolved by this Federal District Court in Civil Action No. 72-2568-R.

It is hereby further ORDERED, ADJUDGED and DECREED that the defendant is permanently enjoined from collecting the sales or use tax on United States Government lease transactions in California as of December 31, 1979.

It is hereby further ORDERED, ADJUDGED and DECREED that the defendant shall refund to the plaintiff all taxes (State and local) collected with respect to United States Government leases under the Tax Act and paid by the United States to its lessors and agent contractors and remitted to the defendant from January 1, 1979 to the date collection ceases.

It is hereby further ORDERED, ADJUDGED and DECREED that the defendant will pay the plaintiff pre-Judgment interest at the rate of 12% (unless Federal law provides for a greater interest rate at the time of payment) on all amounts due and owing to the plaintiff from the date the defendant collected the illegal taxes to the date this Judgment is entered and post-Judgment interest from the date this Judgment is entered to the date the defendant pays the plaintiff.

It is hereby further ORDERED, ADJUDGED and DECREED that the issue of the amount of refund due and owing by the defendant to the plaintiff is hereby severed for separate trial proceedings to be conducted by this Court 180 days after the defendant ceases collection of the sales tax with respect to United States Government leases.

Dated at Los Angeles, California, this 10th day of December, 1979.

/s/ Real
United States District Judge

Presented by:

Andrea Sheridan Ordin
United States Attorney
Charles H. Magnuson
Assistant United States Attorney
Chief, Tax Division
Arthur M. Greenwald
Assistant United States Attorney

By: /s/ Arthur M. Greenwald

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By: /s/ John J. McCarthy